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In The

Supreme Court of the United States

October Term, 1983

ARIZONA WESTERN COLLEGE DISTRICT GOVERNING BOARD, CHARLES McCONNELL, WALTER KAMMANN, HAROLD ANDERSON, AUSTEN HAYDIS and JOHN CURRIE, constituting the members thereof,

Petitioners,

vs.

JOHN F. COOPER, RONALD COSTIN, ROBERT J. GARCIA, JOE L. KING, RALPH MOOREHEAD, JIM R. PELL, ROBERTA PURDY and PHILIP STANLEY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

ARTHUR P. GREENFIELD
WINSTON & STRAWN
3101 North Central Avenue
Suite 1500
Phoenix, Arizona 85012

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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TABLE OF CONTENTS

Pages

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 5

ARGUMENT

I. The Petition For Writ Of Certiorari Is Premature. 6

II. No Prior State Court Litigation Precluded Determination Of The Federal § 1983 Claim..... 7

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

Cooper v. Arizona Western College District Governing Board, 125 Ariz. 463, 610 P.2d 465 (1980)..... 3

Hamilton-Brown Shoe Company v. Wolf Brothers & Company, 240 U.S. 251 (1915) 6

Heike v. United States, 217 U.S. 423 (1909) 6

John Simmons Company v. Grier Brothers Company, 258 U.S. 82 (1922) 6

Migra v. Warren City School District Board of Education, — U.S. —, 76 L.Ed.2d 56 (1984).....5, 6, 8

Panama Railroad Company v. Napier Shipping Company, 166 U.S. 280 (1897) 6

Parr v. United States, 351 U.S. 513 (1955) 6

Patsy v. Board of Regents, 457 U.S. 496 (1982) 4, 5, 7

Scofield v. National Labor Relations Board, 394 U.S. 423 (1969) 6

Switzerland Cheese Association v. E. Horn's Market, 85 U.S. 23 (1966)..... 7

United States v. Florian, 312 U.S. 656 (1941) 7

TABLE OF AUTHORITIES—Continued

Pages

STATUTES

42 U.S.C. § 1983 ..... 2, 3, 5, 7, 8

42 U.S.C. § 1985 8

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STATEMENT OF THE CASE

This litigation arose out of decisions by the District Governing Board of Arizona Western College (hereinafter referred to as the "Board") to terminate the re-

spondents' employment as faculty and administrative staff members at Arizona Western College in meetings held on January 11, 12 and 18 of 1977. Respondents notified petitioners by letter dated January 28, 1977 that they believed the termination and non-renewal decisions were improper and unjustified because the Board failed to comply with the procedures set forth in the Arizona Western College faculty handbook and there was no showing of "cause" justifying the non-renewal decisions as required by the handbook.

Respondents' protestations went unanswered, and on March 1, 1977, they filed two lawsuits against the Board and its individual members. One was a special action[1] filed in the Arizona Superior Court, Yuma County, Cause No. 38653, in which respondents sought a declaration that the non-renewal decisions were made in violation of the Arizona open meeting laws. The second action was the present action filed in the United States District Court for the District of Arizona.

Respondents initiated the present action by filing a complaint pursuant to 42 U.S.C. § 1983, seeking damages and reinstatement for the wrongful non-renewal of their employment contracts as faculty and administrative staff members at Arizona Western College. Respondents also sought an order from the court directing petitioners to grant them a full and fair hearing to challenge any allegations of cause justifying the non-renewal decisions.

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[1]Special action procedure is provided for in Arizona pursuant to rules found at Vol. 17A, Arizona Revised Statutes. Rule 1 of the Rules of Procedure for Special Actions describes the relief available as being that previously obtained by the writs of certiorari, mandamus or prohibition. (*Id.*)

Respondents then initiated discovery in both the Arizona open meeting law action and the action filed pursuant to 42 U.S.C. § 1983 in the United States District Court. On the basis of the discovery conducted by respondents, respondents filed a motion for summary judgment in the Arizona open meeting law action in August of 1977. That motion was granted on February 2, 1978. In finding for respondents, the Arizona Superior Court ruled that the action taken by the Board was in violation of the Arizona open meeting laws, and, therefore, the non-renewal decisions were null and void. In the absence of a valid non-renewal decision, the respondents' employment contracts were automatically renewed. Thus, the ruling in the open meeting law action had the effect of reinstating respondents to their prior positions at Arizona Western College and entitling them to back pay. In order to obtain the back pay, respondents, with the exception of Roberta Purdy, filed new damage actions in the Arizona Superior Court for Yuma County on contract and tort theories in March, 1978.

Petitioners appealed the Superior Court's ruling in the open meeting law action, and the Yuma County Superior Court held the state damage actions in abeyance pending a ruling from the Arizona Court of Apeals. The appeal also made it necessary to hold the federal action in abeyance in order to preserve the respondents' right to seek redress for deprivations of their constitutional rights if the ruling in the open meeting law action was reversed.

On March 4, 1980, the Arizona Court of Appeals reversed the trial court's ruling in the open meeting law action and remanded the case for trial. *Cooper v. Arizona Western College District Governing Board,* 125 Ariz.

463, 610 P.2d 465 (1980). A trial was held in July, 1981, which resulted in a judgment in favor of petitioners. In April, 1982, the Yuma County Superior Court granted judgment in favor of petitioners in the state damage action on the sole ground that respondents failed to exhaust their administrative remedies. It then became necessary for the respondents to look to the federal court action for redress of the deprivation of their due process rights.

On November 18, 1982, petitioners filed a motion to dismiss, or, in the alternative, a motion for summary judgment alleging that they were entitled to judgment in their favor under theories of *res judicata,* abandonment by respondents of the litigation, failure to exhaust administrative remedies, the abstention doctrine, absence of constitutional due process violations, and the affirmative defense of good faith. The United States District Court granted petitioners' motion for summary judgment on the basis that respondents had failed to exhaust their administrative remedies because they had not accepted the hearing offered by the Board. Petitioners' Appendix at A-2.

Respondents appealed the District Court order to the United States Court of Appeals for the Ninth Circuit. On December 23, 1983, the Court of Appeals issued its memorandum opinion reversing the District Court decision and remanding for further proceedings in the District Court. The Court of Appeals ruled that exhaustion of administrative remedies was not required, citing *Patsy v. Board of Regents,* 457 U.S. 496 (1982). The Ninth Circuit also ruled as follows:

> There are at the very least genuine issues of fact concerning the nature of plaintiffs' property interests in

their employment, the correlative procedural protections to which they were entitled and the extent to which the Board's offer of hearing satisfied them.

Memorandum opinion at 2; Petitioners' Appendix at A-2.

Petitioners have now filed a petition for a writ of certiorari seeking review of the memorandum opinion of the Ninth Circuit Court of Appeals.

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SUMMARY OF ARGUMENT

The petition for writ of certiorari should be denied because a final judgment or decree has not been entered. It is well established that a writ of certiorari should issue only after a final judgment or decree. In the present action, the Ninth Circuit held there were unresolved issues of fact precluding summary judgment. Thus, there has not been a final decree or judgment from the courts below, and the petition for writ of certiorari should be denied.

From a substantive standpoint, the petition for writ of certiorari should also be denied. The Ninth Circuit correctly held that respondents were not required to exhaust state administrative remedies before initiating and pursuing an action filed pursuant to 42 U.S.C. § 1983 in federal court, relying upon the clear authority of *Patsy v. Board of Regents,* 457 U.S. 496 (1982). The Ninth Circuit then properly remanded for trial on the merits the issues concerning the nature of respondents' property interests in their employment and the related procedural and substantive matters.

Petitioners' reliance on *Migra v. Warren City School District Board of Education,* — U.S. —, 76 L.Ed.2d 56

(1984) is also misplaced. The facts of the present action are entirely different from those before the Court in *Migra v. Warren City School District Board of Education.* Respondents' § 1983 action was filed before the state court actions were filed. In addition, *there was not a trial on the merits in the state court damage actions.* Therefore, the Ninth Circuit Court of Appeals correctly rejected petitioners' arguments based on *Migra v. Warren City School District Board of Education.*

ARGUMENT

I. The Petition For Writ Of Certiorari Is Premature.

It is well established that a writ of certiorari should issue only after a final decree. *John Simmons Company v. Grier Brothers Company,* 258 U.S. 82 (1922); *Hamilton-Brown Shoe Company v. Wolf Brothers & Company,* 240 U.S. 251 (1915); *Panama Railroad Company v. Napier Shipping Company,* 166 U.S. 280 (1897). Indeed, the concept of "finality" has always been a leading principle in determining the availability of judicial review throughout the federal system.

The Court has held that for purposes of an appeal to the Supreme Court, "a decree is final when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined." *Heike v. United States,* 217 U.S. 423 (1909); *see also, Scofield v. National Labor Relations Board,* 394 U.S. 423 (1969) *Parr v. United States,* 351 U.S. 513 (1955).

In *Switzerland Cheese Association v. E. Horn's Market,* 85 U.S. 23 (1966), the Court held that where summary judgment is denied because of unresolved issues of fact, the order is not appealable. *Accord, United States v. Florian,* 312 U.S. 656 (1941). Although both *Switzerland Cheese Association* and *Florian* involve the question of whether a district court decree was "final" for purposes of appellate review, the principles relied upon by the Court should apply in the instant case.

In the present action, the Ninth Circuit determined that there were issues of fact that made the entry of summary judgment improper and remanded the action to the District Court for further proceedings. Petitioners' Appendix at A-2. Thus, the petition for writ of certiorari should be denied.

II. No Prior State Court Litigation Precluded Determination Of The Federal § 1983 Claim.

Petitioners appear to be arguing that the litigation in the state courts between petitioners and respondents precludes respondents from pursuing the present action. These are the same *res judicata* and collateral estoppel arguments that were rejected below.

In no state court action was there a consideration of the merits of respondents' claims. The *sole* basis for the trial court's decision in the state court damage actions was that respondents failed to exhaust their state administrative remedies. *This ruling* was affirmed by the Arizona Court of Appeals. Petitioners' brief at B-3. As the Court held in *Patsy v. Board of Regents,* 457 U.S. 496

(1982), exhaustion, of state administrative remedies is not a prerequisite to a § 1983 action in federal court. Thus, no state court action between petitioners and respondents operates to preclude the present action filed pursuant to § 1983.

The Ninth Circuit examined both of the state actions and concluded that the issues raised in the § 1983 action were not encompassed within any state court litigation between petitioners and respondents.

The recent decision by the Court in *Migra v. Warren City School District Board of Education,* — U.S. —, 79 L.Ed.2d 56 (1984), does not compel a different result. In *Migra,* the plaintiff brought suit in state court based upon breach of contract and tort theories. The state court action was tried on the merits to the court sitting without a jury, and judgment was rendered in favor of plaintiff. After the state court litigation was finally resolved, plaintiff instituted an action in the United States District Court pursuant to 42 U.S.C. § 1983 and § 1985. This Court held that the Ohio state law regarding claim preclusion applied to the § 1983 action and remanded the case to the District Court for further proceedings.

Here, the state action filed by the respondents was dismissed for failure to exhaust administrative remedies; therefore, there was never a consideration of the merits of respondents' claim. Respondents are not therefore precluded from pursuing the § 1983 action.

CONCLUSION

The Ninth Circuit summarily disposed of petitioners' argument in memorandum opinion form.[2] Petitioners' motion for rehearing and for rehearing en banc were disposed of with equal dispatch; the Ninth Circuit and this Court have denied petitioners' applications for stay of the mandate. No basis, grounds or reasons exist for granting the petition.

Respectfully submitted,

WINSTON & STRAWN

By: ARTHUR P. GREENFIELD
3101 North Central Avenue
Suite 1500
Phoenix, Arizona 85012

Counsel for Respondents

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[2]See Rule 21, Rules of the United States Court of Appeals for the Ninth Circuit.